No. 89-1821

In The

Supreme Court of the United States

October Term, 1990

CHARLES Z. STEVENS, III,

Petitioner,

vs.

UNITED STATES DEPARTMENT OF THE TREASURY,
NICHOLAS F. BRADY, SECRETARY,
U.S. DEPARTMENT OF THE TREASURY,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Court of Appeals erroneously construed the language of § 633a(d) of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 et seq., which provides that a notice of intent to file a civil action must be given "not less than" thirty days prior to suit when it decided that a federal employee's otherwise timely filing of a § 633a(d) notice of intent was rendered "ineffective" as a predicate for an ADEA civil action because the civil action was instituted more than thirty days after the notice was given.

II. Whether a federal employee's untimely attempt to seek administrative relief pursuant to § 633a(b) of the Age Discrimination in Employment Act of 1967 amounts to an irrevocable election of remedies and/or a failure to exhaust required administrative remedies which precludes suit under § 633a(d) of the Act, even though the employee also timely complied with all procedural prerequisites to bringing suit under § 633a(d).

LIST OF PARTIES

Parties to this case are:

Charles Z. Stevens, III, Plaintiff-Petitioner

United States Department of the Treasury, Defendant-Respondent

James A. Baker, III former Secretary of the Treasury, Defendant-Appellee below

Nicholas F. Brady, Secretary of the Treasury (successor to James A. Baker, III as Secretary of the Treasury), Defendant-Respondent

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DECISIONS BELOW

The *per curiam* panel opinion of the United States Court of Appeals for the Fifth Circuit of February 21, 1990 in Case No. 89-1432, Summary Calendar, is unreported and appears as Exhibit B to the Petition for Writ of Certiorari [Pet. App. A-5 – A-8].

The Memorandum Opinion and Order of the United States District Court for the Western District of Texas filed April 19, 1989 in Civil Action No. A-88-CA-340 is also unreported and appears as Appendix A to the Petition for Writ of Certiorari [Pet. App. A-1 – A-4].

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on February 21, 1990.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). The Petition for Writ of Certiorari was filed timely pursuant to 28 U.S.C. § 2102(c), and was granted November 5, 1990.

STATUTES PRESENTED FOR REVIEW

The statutory provisions involved in this case are subsections (b), (c) and (d) of § 15 of the Age Discrimination in Employment Act of 1967, as amended by the Fair Labor Standards Amendments of 1974, 29 U.S.C. § 633a(b), (c) and (d). These statutory provisions are lengthy and are therefore not set forth here. They appear

as Appendix C to the Petition for Writ of Certiorari (Pet. App. A-9 – A-10).

The federal regulations pertinent to this case are 29 Code of Federal Regulations, Part XIV, § i613.214 and §§ 1613.501-521 (1989). Said regulations are lengthy and are therefore not set forth here. They appear as Appendix D to the Petition for Writ of Certiorari (Pet. App. A-11 – A-15).

STATEMENT OF THE CASE

In August, 1986, at the age of sixty-three, Petitioner Charles Z. Stevens was accepted into a Revenue Officer Training Program with the Internal Revenue Service in Austin, Texas [RTr 5][1] as a GS-7 level civil service employee [J.A. 14]. He remained in that program until April 27, 1987 when, after a transfer to a new geographic area and assignment to a new training instructor (RTr 9-10], he was directed by the instructor to request a demotion to a GS-6 job and a transfer out of the trainee program [RTr 11-12]. Younger trainees were retained in the program [RTr 24-25].

[1] The record in this case consists of two separately paginated bound volumes, a volume of pleadings, designated in this brief as RPl, and a volume containing the trial transcript, designated in this brief as RTr. In addition, the record includes the exhibits introduced by the parties at trial which are not separately bound or paginated and which will be referred to in this brief by exhibit number as either Plaintiff's Exhibit (P Ex.) or Government's Exhibit (G Ex.). Citations to the Joint Appendix are designated J.A.

Believing the forced demotion/transfer to be unfair and possibly discriminatory, Petitioner contacted his Congressman requesting assistance [J.A. 8-10]. When that avenue of relief did not bear fruit [G Ex 2, pp. 103-110; RTr 25-26], Petitioner began the odyssey in search of a determination of the merits of his claim by which he has arrived at this Court. He is, however, despite his efforts, still without any judicial or administrative decision as to whether he has been discriminated against.

Sometime in September, 1987, Petitioner attempted to invoke his agency's internal administrative age discrimination grievance procedures by contacting agency EEO personnel. On September 24, 1987, he was granted a formal interview with an EEO counselor [RTr 26]. Because this date was more than thirty days[2] from the date of the allegedly discriminatory action, however, Petitioner's complaint was treated by the agency as having been filed out of time and the only issue that the agency considered in its adjudicative procedures was whether or not the requisite good cause for the out of time filing could be shown [G Ex 2 p. 76; J.A. 16-19]. Petitioner believed he did have good cause for the delay, so he proceeded through the administrative process in an attempt to

[2] Under the regulations promulgated by the EEOC relative to enforcement by federal employees of their rights under § 15 of the ADEA, 29 U.S.C. § 633a, contacting an agency EEO counselor within thirty days of the discrimination, or having good cause for not doing so, is a required first step if the employee wishes to invoke the complex internal agency administrative process provided for under § 15(b) for administratively ascertaining and resolving the merits of his or her age discrimination claim, 29 C.F.R. § 1613.214; § 1613.511.

establish such cause, filing a formal complaint [J.A. 11-15] and awaiting final administrative decisions on the good cause issue from the Regional Complaint Center of the Department of the Treasury [J.A. 16-19] and, on appeal, from the Office of Review and Appeals of the Equal Employment Opportunity Commission [J.A. 20-21]. Both the agency and the EEOC ORA, however, determined that Petitioner had not established good cause for his delay in seeking EEO counseling. Therefore, the final agency action was a rejection of the formal complaint and the administrative process never actually addressed the substantive merits of Petitioner's age discrimination claim.

Recognizing the possibility that his complaint might be rejected due to the untimely filing, Petitioner consulted his Federal Employee Personnel Manual and discovered that with respect to his claim of age discrimination there was an alternative way to preserve the right to go to court on the merits of his complaint. He could file a notice of his intent to institute a civil action and, provided he did that within 180 days of the actual discrimination and permitted that notice to remain on file for thirty days, could proceed to federal court at any time within six years of the occurrence of the alleged discriminatory act [RTr 17-18, 22; G Ex 4, p. 68][3]. In conformance with this directive, Petitioner filed his notice of intent on October 19, 1987 [Pet. App. A-7][J.A. 15], 176 days from

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[3] Although the manual does not cite any specific statute, this is clearly a description of the mechanism prescribed by § 15(d) of the ADEA, 29 U.S.C. § 633a(d), for bypassing internal administrative remedies, together with a statement as to the agency's interpretation of the applicable statute of limitations. See discussion at p. 11, infra.

the date of the alleged discrimination, in order to preserve his right to sue in the event the agency rejected his administrative complaint.

Petitioner awaited the final administrative decision on the timeliness issue, and received his notice of the March 30, 1988 rejection of his complaint on April 4, 1988 [RTr 82]. Petitioner filed his civil action in the United States District court for the Western District of Texas on May 3, 1988, a date within thirty days of his receipt of the final administrative decision and more than thirty days from the date on which he had previously given his notice of intent to file civil action [J.A. 2,15]. Petitioner's *pro se* complaint, alleged, *inter alia*, that he had been the victim of age discrimination and sought a remedy pursuant to § 15 of the Age Discrimination in Employment Act, 29 U.S.C. § 633a [J.A. 2]. He attached to the complaint copies of the administrative complaint [J.A. 11-15], the decisions rejecting it [J.A. 16-19, 20-21], and of the notice of intent to file civil action [J.A. 15].

Petitioner proceeded with his matter *pro se* until December, 1988 when he was finally able to obtain counsel to represent him in the district court [J.A. 1]. The case proceeded to trial in district court on March 29, 1989 [J.A. 1]. At the one-day bench trial the court, without objection from either party, took evidence as to both the substantive merits of the age discrimination claim and the reasons for Petitioner's delay in initially contacting the EEO counselor.

At the conclusion of the Petitioner's case, the Government made a motion pursuant to Rule 41(b) of the Federal Rules of Civil Procedure for dismissal of the

complaint arguing, *inter alia*, that the Petitioners' untimely invocation of the internal agency remedy procedures deprived the Court of jurisdiction to the hear the case altogether [RTr 79]. Petitioner answered that the alternative procedure found in § 15(d) of the ADEA, 29 U.S.C. § 633a(d), permitted bypassing the administrative complaint route, and argued that the Government's dismissal motion improperly assumed the necessity of exhausting administrative remedies, and that the notice of intent that the Petitioner had filed within 180 days of the allegedly discriminatory act provided a sufficient jurisdictional basis for the Court to consider the merits of Petitioner's claim [RTr 80] [J.A. 22-23]. The district court reserved ruling on the 41(b) motion [RTr 83] and directed the Government to present its evidence, which it did as to both the merits and the timeliness issue [RTr 83-176].

In a written Order and Memorandum Opinion issued April 7, 1989, the district court concluded that the Petitioner had filed his internal administrative complaint too late, and had not demonstrated sufficient good cause to permit either the agency or the court to consider the merits of his case pursuant to § 15(b) of the ADEA, 29 U.S.C. § 633a(b) [Pet. App. A-2 – A-3]. The district court also addressed the bypass option of § 15(d) but misconstrued the language of that section to require filing the actual civil action as opposed to the notice of intent to sue within 180 days of the allegedly discriminatory act. Since the civil action was clearly filed more than 180 days from the date of the discrimination the District Court concluded that no § 15(d) predicate for jurisdiction existed either [Pet. App. A-3], and dismissed the case.

Petitioner made a timely appeal of this decision to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit reversed the district court's ruling with respect to § 15(d), specifically holding that Petitioner had complied with the requisites of § 15(d) by giving notice on October 19, 1987 of his intent to file suit [Pet. App. A-7]. The Court of Appeals went on to conclude, however, that this properly given notice was rendered "ineffective" by the fact that "Stevens did not initiate the present action in federal court until May 4, 1988" [Pet. App. A-7]. The Court of Appeals therefore, affirmed the district court's dismissal of the case.

Petitioner does not challenge the finding that he contacted his EEO counselor too late to obtain administrative adjudication of his claim. Petitioner does challenge the ruling of the court of appeals that the district court had no jurisdiction because of the lapse of more than thirty days between the filing of the § 15(d) notice and the institution of the federal court action. Petitioner contends that this simply misreads the words "not less than" in the Age Discrimination In Employment Act to mean "not more than." Petitioner also challenges the implicit ruling of the court of appeals that Petitioner was entirely foreclosed from bypassing the § 15(b) administrative procedures pursuant to § 15(d) due to the fact that he had made his failed attempt to invoke § 15(b) administrative procedures. Petitioner contends that this ruling both imposes on him a duty to exhaust his administrative remedies, and binds him irrevocably to the outcome of those administrative remedies, neither of which are required by the statute.[4]

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[4] Although the Fifth Circuit did not specifically articulate that it was imposing stringent exhaustion and election

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Petitioner respectfully submits that on certiorari this Court should rectify these errors of the court below.

SUMMARY OF ARGUMENT

The stated basis for the Fifth Circuit's affirmance of the dismissal of Petitioner's case was simply a mis-reading of the requirement of § 15(d) of the Age Discrimination in Employment Act, 29 U.S.C. § 633a(d) that an age discrimination claimant give "not less than thirty days notice" of his intention to file suit. The Fifth Circuit construed this to mean that a suit filed more than thirty days from the notice was untimely. In fact, the clear meaning of "not less than" in this and other statutes in which it appears is that the notice must last for at least thirty days but that a suit filed any time after thirty days is properly filed.

The Fifth Circuit's affirmance of the dismissal of Petitioner's case also held implicitly that Pet...oner had given up his right to proceed to federal court through the mechanism prescribed by § 15(d) of the Age Discrimination

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requirements, its decision is fully consistent with *White v. Frank*, 895 F.2d 243 (5th Cir. 1990), *cert. den.* ___ U.S. ___, 111 S.Ct. 232 (1990) (White and Blackmun, J.J., dissenting), decided shortly after the instant case, in which the Fifth Circuit clearly and explicitly adopted a requirement that federal employee ADEA claimants are bound to exhaust administrative remedies, once invoked, notwithstanding the existence of bypass procedures under the statute. The Fifth Circuit has not spoken to the election issue other than implicitly in this case.

in Employment Act because he attempted, but failed, to seek an alternative method of relief under § 15(b) of the Age Discrimination Act. The plain statutory language, supported by the legislative history of the statute, makes it clear that § 15 imposes no requirement on § 15 age discrimination claimants that they exhaust § 15(b) administrative remedies at all. Nor does anything in the language or legislative history of § 15 justify holding that a failed attempt to invoke administrative remedies under § 15(b) would preclude access to federal court under § 15(d). This Court's prior decisions interpreting employment discrimination statutes and concerning election and/or exhaustion of remedies also lead in the direction of not requiring exhaustion in ADEA cases and not binding ADEA claimants to a preclusive election of remedies under the circumstances presented here..

ARGUMENT

I. Petitioner's Civil Action Was Filed In A Timely Fashion After Petitioner Gave His Notice Of Intent To File Suit.

The court of appeals' unpublished opinion in this case relies on the seven month time lapse between the date it holds Petitioner gave his notice of intent to sue as required under § 15(d) of the Act (Pet. App. A-6 – A-7) and the date suit was actually filed to conclude that Petitioner's notice of intent was "not effective" as a predicate for Petitioner's civil action. This appears simply to be a misreading of the plain language of the statute, construing the requirement of § 15(d) that an individual

must give "not less than thirty days notice of intent to file" as if it meant that suit must be filed "not more than thirty days from the notice". In arriving at this construction, the court of appeals may have adopted a similar error made by the district court, when the district court held that under § 15(d) a complainant is required to "notify the EEOC within thirty days prior to commencing suit" (Pet. App. A-3).

The use of the term "not less than" to mean "at least" or "equal to or more than" is common in English. In this statute it has a clear meaning that a minimum of thirty days notice must be given before a lawsuit is commenced. It does not, however, prevent a notice longer than thirty days from being effective. The language employed in the original version of the private sector Age Discrimination in Employment Act of 1967 (81 Stat. 605, § 7(d), current version codified at 29 U.S.C. § 626(d)) is identical in all respects except as to the actual length of the notice to the language of § 15(d). It has been consistently interpreted to mean that the claimant must give notice of at least sixty days, after which time suit could be filed at any time within the applicable statute of limitations, e.g., *Wright v. Tennessee*, 628 F.2d 949 (6th Cir. 1980), *Bengochea v. Norcross, Inc.*, 464 F.Supp. 709 (E.D.Pa. 1979), see also, *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 754 (1979) (Respondent [plaintiff below] filed notice of intent on March 10, 1976. Suit in district court instituted March 7, 1977. No contention that suit was untimely because of failure to meet § 7(d) notice requirements).

It has thus been implicitly recognized by this Court that the words "not less than" in the ADEA mean that a civil action is timely filed at any time thirty days or more

after the filing of a notice of intent. Indeed, the Respondents have conceded in this Court that "the notice in this case clearly complied with the thirty day requirement in § 633a(d)" and agree that the court of appeals appears to have adopted the district court's misreading of "not less than" to mean "within", Brief of Respondents in Opposition to Granting Writ at 7.

The seven month time lapse between October, 1987 and May 3, 1988 also falls well within any statute of limitations that might apply to this action, whether it is the statute for private sector ADEA actions, 29 U.S.C. § 626 (incorporating the general Fair Labor Standards Act limitation, § 29 U.S.C. 255, two years for non-wilful violations, three years for wilful violations), see *Wiersma v. Tennessee Valley Authority*, C.A. No. 3-85-1160, (E.D. Tenn., March 12, 1986), 41 BNA FEP Cases 1588, or the general six year statute of limitations for actions against the federal government, 28 U.S.C. § 2401(a), *Bornholdt v. Brady*, 869 F.2d 57, 68 (2nd Cir., 1989), *Marks v. Turnage*, 680 F.Supp. 1241 (N.D.Ill. 1988), *modified* 47 BNA FEP Cases 666. Moreover, the Petitioner's suit was filed within thirty days of his notice of the final agency action rejecting his claim, which would make it timely even if, contrary to *Bornholdt*, the thirty-days-from-notice-of-agency-action requirement of Title VII of the Civil Rights Act of 1964, § 717(c), 42 U.S.C. § 2000e-16(c) were held to apply to § 15 of the ADEA.

The passage of the seven months between the filing of the notice of intent and institution of suit in the instant case does not, therefore, render Petitioner's otherwise timely notice "not effective" as a predicate to suit. This

Court, having granted certiorari, should take the opportunity to correct this clear error of law by reversing the decision of the court of appeals and remanding the case for further consideration under the correct reading of the thirty day notice requirement of § 15(d).

II. Petitioner Should Not Be Foreclosed From Pursuing His § 15(d) Civil Action Simply Because He Failed Timely To Invoke His § 15(b) Administrative Remedies.

With the grant of certiorari in this case, this Court has an opportunity to resolve a growing dispute among the circuits concerning whether § 15 of the Age Discrimination in Employment Act, 29 U.S.C. § 633a, is to be read as it is written and allow federal employees to proceed directly to federal court for a resolution of their age discrimination claims after giving thirty days notice of their intent to do so, § 15(c) and (d), or whether the courts will be permitted to read into the Act a preclusive requirement of election and exhaustion of the optional internal agency administrative remedies available under § 15(b). The latter approach reads into the ADEA an exhaustion requirement similar to the exhaustion required of federal employees with race, color, sex, religion and national origin discrimination claims by § 717(c) of Title VII of the Civil Rights Act of 1964 42 U.S.C. § 2000e-16, *Brown v. GSA*, 425 U.S. 820, 835 (1976), but without the right § 717(c) gives to abandon the administrative process if it is not completed in 180 days.

Noting that on its face § 15(c) of the Age Discrimination in Employment Act differs from § 717(c) of the Civil

Rights Act by specifically granting jurisdiction to the federal courts *without* requiring exhaustion of administrative remedies, and that § 15(d) also provides a specific mechanism for bypassing the administrative process, the United States Courts of Appeals for the Sixth Circuit, *Langford v. U.S. Army Corps of Engineers*, 839 F.2d 1192, 1194-95 (6th Cir. 1988) adopts the first, and stronger, no-election/exhaustion position. *Langford* is in accord on this issue with decisions in the Eighth, *McIntosh v. Weinberger*, 810 F.2d 1411, 1425-26 (8th Cir. 1987) vacated and remanded on other grounds *sub nom. Turner v. McIntosh*, 487 U.S. 1212 (1988), Eleventh, *Ray v. Nimmo*, 704 F.2d 1480, 1484-1485 (11th Cir. 1983), and District of Columbia Circuits, *Proud v. U.S.*, 872 F.2d 1066, 1068-69 (D.C. Cir. 1989), *Kennedy v. Whitehurst*, 690 F.2d 951, 960-65 (D.C. Cir. 1982). These courts conclude that administrative proceedings under the ADEA are not a "pervasive and integral part of the overall scheme of enforcement", *Kennedy*, 690 F.2d at 964, and "that exhaustion of administrative remedies, even once they are initiated, is not required before filing a civil action in federal court", *Langford*, 839 F.2d at 1194. These conclusions are amply supported, as will be demonstrated at length hereafter, by the language and the legislative history of the Act.

The Court of Appeals for the Fifth Circuit in *White v. Frank*, 895 F.2d 243 (5th Cir. 1989) *cert. den.* ___ U.S. ___, 111 S.Ct. 232 (1990), has joined the Courts of Appeals of the Third, *Purtill v. Harris*, 658 F.2d 134, 138 (3rd Cir. 1981), *cert. den.*, 462 U.S. 1131 (1983), First, *Castro v. U.S.*, 775 F.2d 399, 404 (1st Cir. 1985) and Seventh Circuits, *McGinty v. Dept. of the Army*, 900 F.2d 1114, 1117 (7th Cir. 1990) and adopted the second, weaker, position reading

into § 15 the same strict exhaustion requirement as is imposed by § 717(c) of Title VII, at least where the administrative agency has accepted the claim for processing and the employee has made no attempt to pursue the alternate "notice of intent" option under § 15(d). The 9th Circuit has also spoken approvingly of this view, *Romain v. Shear*, 799 F.2d 1416, 1419 (9th Cir. 1986) *cert. den.*, 481 U.S. 1050 (1987), *Limongelli v. Postmaster General of the U.S.*, 707 F.2d 368, 373 (9th Cir. 1983).[5] In the instant case, the Fifth Circuit apparently took *Purtill* one step further and imposed its requirements on Petitioner even though his claim was rejected for processing, he had given a § 15(d) notice, and had awaited the final agency action on his unsuccessful attempt to file a § 15(b) complaint before proceeding to federal court.

The courts on both sides of the issue claim the regulations promulgated by the EEOC to implement § 15(b) support their respective positions, compare *Langford* at

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[5] Taking their lead from *Purtill*, these courts have relied largely on the similarities between § 15(b) of the ADEA, 29 U.S.C. § 633a(b) and the administrative remedial scheme of § 717(b) of Title VII, 42 U.S.C. §§ 2000e-16(b) to conclude, erroneously, that there was a congressional preference that federal employees pursue their ADEA claims as fully as possible through the administrative process, *Purtill*, 658 F.2d at 138 ("[a]bsent an indication of contrary congressional intent, we will not countenance circumventing the administrative process"), see also, *McGinty*, 900 F.2d at 1117, *White*, 895 F.2d at 243-44 (adopting *in toto* the holding of the district court, 718 F.Supp. 592, 596-97 (W.D. Tx. 1989)), *Castro*, 775 F.2d at 404. In fact, there is substantial evidence of "contrary congressional intent".

1195, (the fact that ADEA regulations exclude from adoption of Title VII regulations all reference to requiring final agency action prior to suit supports no need to exhaust) with the very strained reading of *McGinty*, 900 F.2d at 1116 (fact that *exceptions* to exhaustion requirement are not incorporated into ADEA regulations indicates EEOC intent to require exhaustion). The Second Circuit, in *dictum* in *Bornholdt v. Brady*, 869 F.2d 57, 63 (2nd Cir. 1989) suggests that a change in one of the regulations, 29 C.F.R. § 1613.513 (eliminating, with respect to lawsuits filed after November 30, 1987, a requirement that the agency continue processing the charge even if a civil action were filed) supports an exhaustion requirement for suits filed before November 30, 1987 but eliminates it for suits, like Petitioner's here, filed thereafter, *c.f. Langford* at 1195 (using the fact that the regulations both before and after November 30, 1987 contemplate the possibility that suit would be filed while the administrative process is still pending to underscore the absence of an exhaustion requirement.), see also Brief of Respondent in Opposition at 8, n.5 ("EEOC regulation 29 C.F.R. 1613.513 . . . assumes that a judicial complaint may properly be filed before the administrative process is complete"). *Langford's* is the more reasonable view of the regulations not only because it is the one the government itself endorses, but because neither of the other decisions account for the fact that the specified provisions are part of a larger regulatory scheme which deletes all requirements relating to exhaustion.

As previously noted, Petitioner's case is not completely on all fours with any of the cases cited. Petitioner actually did "await final action by [the] agency before

filing an action in federal district court", *White*, 895 F.2d at 244. If "exhaustion" is defined as simply letting the agency reach a final decision, regardless of grounds for that decision, Petitioner here has exhausted his administrative remedies in compliance with the requirements of *White*. See also, *Purtill*, at 138, and *Castro*, at 404. The statutory language and legislative history strongly support this reading.

However, at least in the Title VII context, "exhaustion" implies not simply achieving a final agency decision or default, but also having complied with procedural requirements as to timeliness so that the administrative agency was actually empowered to accept the complaint for processing on the merits, *Brown v. GSA*, 425 U.S. at 835, *Wade v. Sec. of Army*, 796 F.2d 1369, 1376 (11th Cir. 1986). In its mistaken reliance on a Title VII analogy, the Seventh Circuit in *McGinty* upheld the dismissal of the plaintiff's ADEA claim for failure to exhaust because, although the plaintiff had initiated her agency complaint process in a timely fashion, she failed to appeal the final agency decision on the merits to the EEOC within the time prescribed by the regulations, 29 C.F.R. §§ 1613.521, 1613.233, 900 F.2d at 1115-16 and 1118.[6]

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[6] Unlike the Petitioner here, Ms. McGinty had apparently made no attempt to give a specific § 15(d) notice of intent to file suit. The Seventh Circuit therefore did not consider whether or not the plaintiff would be entitled to the alternate route provided by § 15(d), see also *Loe v. Heckler*, 768 F.2d 409, 416 n. 15 (D.C. Cir 1985). However, those courts which have considered the issue directly, and the EEOC itself, have concluded that submitting a complaint concerning the discrimination complained of to the employing agency within 180 days

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Under the Title VII definition of exhaustion, Petitioner did, indeed, fail to exhaust administrative remedies, and it appears that it is this standard that the court of appeals held him to. The ADEA, however, does not require this. In fact, since Petitioner's default under § 15(b) lay at the very threshold of filing his claim, i.e., he waited for more than thirty days to contact his EEO counselor, he not only did not exhaust his § 15(b) remedies, he technically never invoked them in the first place and the need, if any, to exhaust them never arose. Under the applicable regulations, Petitioner's formal complaint was never accepted for processing at all: "The agency may accept the complaint for processing . . . *only if*: (i) The complainant brought to the attention of the Equal Employment Opportunity Counselor the matter causing him/her to believe he/she had been discriminated against within 30 calendar days . . . " 29 C.F.R. § 1613.214(a)(1)(i) (emphasis added).

The Fifth Circuit's holding that Petitioner's unsuccessful attempt to get his complaint processed administratively precluded him from going to court via § 15(d) is thus even more at odds with the statutory language than the Seventh Circuit's view in *McGinty*, where the plaintiff had actually gotten the administrative process started but had dropped the ball in midstream. Indeed, the Fifth Circuit's approach in this case is not only to require

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satisfies the § 15(d) notice requirement, Brief of Respondent in Opposition to Petition for Writ of Certiorari, at 6 n.8. *Ray*, 704 F.2d at 1484-85, *Purtill*, 658 F.2d at 138, *McIntosh*, 810 F.2d at 1425 n.6, see also *Davis v. Devine*, 736 F.2d 1108, 1114 (6th Cir. 1984) *cert. den.* 469 U.S. 1020.

exhaustion of remedies, once they are invoked, but also to impose a draconian election of remedies requirement which subordinates Petitioner's right to proceed pursuant to § 15(d) (with which he admittedly complied) to a default under § 15(b) that rendered his access to § 15(b) procedures void *ab initio*. If the ADEA made § 15(b) the only route to federal court (as its counter-part is under Title VII), this threshold failure might be preclusive, *Brown v. GSA*, 425 U.S. at 835. However, the ADEA prescribes an equally valid alternate route, § 15(d), specifically for people who do not or cannot use the § 15(b) route.

Petitioner submits that neither the statutory language and legislative history of the ADEA nor the prior decisions of this Court support even the exhaustion requirements imposed in *White, Purtill, Castro,* and *McGinty,* much less the preclusive election requirement imposed upon Petitioner in the instant case. Review of these decisions in light of the statute's own words, congressional intent and this Court's precedent must lead, Petitioner submits, to the conclusion that the outcome in *Langford* and the rationales articulated in that case and in *McIntosh, Kennedy* and *Ray* are the correct ones and that this Court should adopt a similar interpretation of § 15 of the Age Discrimination in Employment Act in this regard.

A. The Plain Language Of the Act Supports Not Binding Federal ADEA Claimants To A Strict Election Or Exhaustion Of Remedies.

On April 8, 1974, President Nixon signed into law the 1974 Amendments to the Fair Labor Standards Act, Pub.

L. 93-259, 93rd Cong. 2d Sess. (1974). Section 28 of this statute, 88 Stat. 74-75, *reprinted in* 1974 U.S. Code Cong. & Admin. News 55, 79-80, added a new § 15, 29 U.S.C. § 633a, to the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621, *et seq*. This section, a hybrid of the prior statutes prohibiting age discrimination in private employment, 29 U.S.C. §§ 621-626, and race, color, sex, religion and national origin discrimination in federal employment, 42 U.S.C. §§ 2000e-16, prohibited the federal government from discriminating against its own employees on the basis of age, *Lehman v. Nakshian*, 453 U.S. 156, 157 (1981). Section 15(a) of the new law, 29 U.S.C. § 633a(a), contained the general prohibitory language. Section 15(c), 29 U.S.C. § 633a(c) gave federal district courts jurisdiction to hear claims of employees under the new Act. The rest of § 15 created two distinct remedial options for federal employees who believe themselves to be the victims of prohibited age discrimination.

The first remedial option is an administrative remedy established pursuant to § 15(b) of the Act, 29 U.S.C. § 633a(b). This section gives the Equal Employment Opportunity Commission[7] authority "to enforce the provisions of [§ 15(a)] through appropriate remedies" and directs the Commission to "issue such rules, regulations,

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[7] This was originally the Civil Service Commission. Reorganization Plan No. 1 of 1978, 43 Fed. Reg. 19807, 5 U.S.C.S. § 903 note, (1990), and 29 U.S.C. § 633a note, (1990), transferred these functions to the Equal Employment Opportunity Commission, with which agency those functions remain.

orders and instructions as it deems necessary and appropriate to carry out its responsibilities" under the Act. In addition, the Civil Service Commission is specifically directed to "provide for the acceptance and processing of complaints of discrimination in federal employment on account of age", ADEA § 15(b)(3), 29 U.S.C. § 633a(b)(3), *Lehma v. Nakshian*, 453 U.S. at 158. Pursuant to this directive, the Commission enacted the regulatory scheme that is now set forth at 29 C.F.R. §§ 1613.501-521. These regulations adopt, with certain crucial exceptions, the administrative enforcement scheme established by 29 C.F.R. §§ 1613.213-1613.421 for federal employees who consider themselves to be victims of race, color, religion, sex, or national origin discrimination in violation of § 717 of Title VII. In keeping with § 15(c), the Commission excluded from the age discrimination enforcement regulatory scheme, however, all provisions that could be construed as requiring a final agency decision or exhaustion of the administrative process as a necessary prerequisite to institution of a federal civil action for enforcement of a federal employee's ADEA rights, §§ 1613.513; 514; and 521. A federal employee who opts to complete the administrative procedure does, however, have access, if aggrieved by the outcome of the administrative process, to federal court for *de novo* consideration of his claims, 29 U.S.C. § 633a(c), see also *Nakshian*, 453 U.S. at 158 n.6, *Chandler v. Roudebush*, 425 U.S. 840 (1976).

The second remedial scheme is set forth in § 15(d) of the Act, 29 U.S.C. § 633a(d). Under this provision, a federal employee who believes himself to be a victim of age discrimination need only give notice, within 180 days of the alleged discrimination, of an intent to institute

such a civil action and then wait "not less than thirty days", during which time the prospective defendants may be notified of the claim and given a brief opportunity to eliminate the alleged unlawful practice. Once this is done, the statute permits the aggrieved employee to institute a civil action without further administrative disposition of his claim.

The only possible textual support in the ADEA for any election or exhaustion of remedies requirement is the language in § 15(d) that the 180/30 day notice is required "[w]hen the individual has not filed a complaint concerning age discrimination with the Commission". This provision, unfortunately, is "a model of imprecision" *Kennedy*, 690 F.2d at 955, but its context indicates it is not to be construed preclusively.

Significantly, none of the courts of appeals that discuss at length why they impose an exhaustion requirement invoke this language to justify their conclusions, though the district court in *White v. Frank* does, 718 F.Supp. at 596. Most courts that have addressed this clause interpret it to mean that the § 15(d) special notice is required if and only if the employee has not filed a complaint or otherwise given notice directly to this employer, *Ray v. Nimmo*, 704 F.2d at 1484 ("by its own terms subsection (d) requires a notice of intent to sue *only* when the complainant has *not* filed a complaint with the Commission, see *Purtill v. Harris*, 658 F.2d at 138 [other citations omitted, first emphasis added]. . . . Thus, a plaintiff need not file such a notice prior to proceeding to federal court when the plaintiff has already proceeded through the EEOC complaint process"), see also, *McIntosh*, 810 F.2d at 1425, n.6. This interpretation is the

one most consistent with the rest of § 15(d) which specifies that the purpose of this notice is only to give prospective defendants notice of the claim and a brief opportunity to conclude it, something which filing or attempting to file a complaint with the agency also does, 704 F.2d at 1483-84 n.9. This does not "read § 15(b) out of existence" as the district court in *White* fears, 718 F.Supp. at 596. It simply acknowledges that § 15(b) agency adjudication is not required to get to federal court. Even if the language were to require allowing the administrative adjudicative process to run its course if invoked, it should not be construed as requiring Title VII-type preclusive exhaustion of that process since the ADEA does not impose that kind of duty on ADEA claimants or give the administrative process the crucial role with respect to ADEA claims that it plays in Title VII cases. This clause, at most, requires only what Petitioner here did: await the final determination of the agency that it would *not* accept his complaint for processing.

Even assuming, *per arguendo*, a preclusive reading of the introduction to § 15(d), it does not preclude a § 15(d) notice from being valid under the circumstances of the instant case. Where, as here, the § 15(b) complaint was untimely *ab initio* it should not even be considered a "complaint filed" within the meaning of the introductory language to § 15(d), since the agency, under the applicable regulations, §§ 1613.214(a)(1)(i), never accepted it as a "complaint" for processing or adjudication as such.[8] To

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[8] As is set forth at p. 36, n.18 and p. 41, infra, this is, however, sufficient to fulfill the lesser office of "notice of intent" under the notice provision of § 15(d) provided it is done within 180 days of the alleged discriminatory act.

preclude use of the § 15(d) process by Petitioner under these circumstances would be thoroughly inconsistent with the statute's own stated purpose for making the § 15(d) bypass option available – to afford potential defendants a notice of the claim and give a brief (30 day) opportunity to correct the problem before the employee resorts to the civil action that § 15(c) gives him the right to file without any other administrative action on his claim.

On its face, therefore, § 15 clearly imposes no obligation on federal employees claiming age discrimination in employment to either exhaust the administrative remedies optionally available to them under § 15(b) or to make a preclusive election between the two different remedial schemes established by the Act.

B. The Legislative History Supports The Plain Language Of The Statute In Not Binding Federal ADEA Claimants to A Strict Election Or Exhaustion Of Remedies.

Section 15 of the ADEA was not enacted on a *tabula rasa*. Prior to taking up the prohibition of age discrimination in employment in the federal sector, Congress had acted to prohibit both age discrimination in employment in the private sector, 29 U.S.C. § 621 *et seq.*, and employment discrimination on the basis of things other than age in the federal sector, § 717, Title VII of the Civil Rights of 1964, as amended, 1972. Thus, when Congress turned its attention to prohibiting age discrimination in the federal sector, it had two rather different statutory schemes on which it could draw. It considered, but rejected, simply adopting either one of them as the exclusive method for

enforcement of the ADEA in the federal sector. Rather, as is revealed by an analysis of the process by which the final statutory language was arrived at, § 15 was drafted to give federal ADEA claimants non-exclusive access to the remedial options of both statutes.

In 1967, Congress had prohibited age discrimination in employment in the private sector by enacting the Age Discrimination in Employment Act of 1967, Pub. L. 90-202 90th Cong., 1st Sess. (1967) 81 Stat. 602 (now codified at 29 U.S.C. §§ 621-634). Part of the Fair Labor Standards Act, the ADEA vested primary enforcement responsibilities in the Secretary of Labor,[9] 29 U.S.C. § 626, and adopted the FLSA's statute of limitations, 29 U.S.C. § 626(e)(1)[10] and many of its enforcement measures, 29 U.S.C. § 626(b)[11]. The only procedural prerequisite to an aggrieved private sector employee's filing a civil action to redress age discrimination was that, within 180 days of the alleged discrimination, he had to give "not less than sixty days notice of an intent to file such action", Pub. L.

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[9] The same reorganization plan that transferred the Civil Service Commission's duties under § 15, 29 U.S.C. § 633a, to the Equal Employment Opportunity Commission, n.7, supra, also transferred the Secretary of Labor's functions under this provision to that agency.

[10] 29 U.S.C. § 255: Action must be initiated within two years from accrual of claim if violation is not wilful, three years if wilful.

[11] 29 U.S.C. §§ 211(b), 215, 216, 217 and 259, including the availability of liquidated damages in addition to actual back-pay.

90-202, § 7(d)(1), 81 Stat. 604.[12] There was no requirement that any administrative adjudication or decision precede filing suit.

Five years later Congress prohibited federal sector employment discrimination, but addressed only those forms of discrimination – race, color, religion, sex and

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[12] In 1978, this section was amended to require the filing, within the same time frame as previously provided, of a "charge alleging unlawful discrimination" in lieu of a "notice of intent" 29 U.S.C. § 626(d). Concern over attempts by the courts to limit access by age discrimination victims to the courts had led the Senate to initially propose the elimination of the notice requirement altogether, S. Rep. No. 493, 95th Cong., 1st Sess. 12-13 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News 504, 515-16; H.R. Conf. Rep. No. 950, 95th Cong., 2d Sess., 12-13 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News at 533-34; 123 Cong. Rec. 34296 (1977) (Remarks of Sen. Williams). Of particular concern was the fact that the old "notice of intent" requirement implied that the employee had to say in so many words that it was his intent to actually file suit, and that this may have deterred people from giving the requisite notice, 124 Cong. Rec. 7882 (1978) (remarks of Rep. Quie). The change from "notice of intent" to "charge" thus appears to have been made to meet this concern, rather than to substantively alter the purpose of the notice or to unduly restrict the right of age discrimination claimants to take their cases to federal court, see also, 124 Cong. Rec. 8217 (1978) (remarks of Sen. Williams). Indeed, the conference report issued in connection with the statute makes it clear that the change from "notice of intent" to "charge" was not made to alter the basic purpose of the Act – to accord prospective defendants notice of and a brief opportunity to remedy claims of discrimination. The conference also specifically stated that the charge requirement was not to be considered a jurisdictional prerequisite and was to be subject to equitable modification, H.R. Conf. Rep. 950 at 12.

national origin – prohibited by Title VII of the Civil Rights Act of 1964, § 703, 42 U.S.C. §§ 2000e-2. As part of a comprehensive bill amending and updating the Civil Rights Act of 1964, Congress enacted a new section, § 717, 42 U.S.C. § 2000e-16, to address the problems of discrimination in federal employment. Section 717(a) substantively prohibited such discrimination by the federal government. Section 717(b) vested enforcement and rule making authority in the Civil Service Commission[13], to "enforce the provisions of [§ 717(a)] through appropriate remedies." Pursuant to this directive, the regulatory scheme set forth at 29 C.F.R. §§ 1613.201-1613.421 was enacted. These regulations make contact with an EEO counselor at the aggrieved employees' own agency within thirty days of the discrimination (or a showing of good cause for failure to do so) the required first step in the administrative complaint process §§ 1613.214(a)(1)(i).

Section 717(c) granted any person dissatisfied with the final agency disposition of his or her claim the right to file a civil action in federal court to redress the discrimination. The statute itself specifically provided that the prerequisite to a § 717(c) action was that the administrative procedures set up under § 717(b) must have been pursued to a final decision level or have been pending with the agency for more than 180 days without a final decision. Unlike the scheme under the private sector ADEA, it was anticipated that federal Title VII claimants would be required timely to invoke, and thereafter to exhaust, an administrative adjudicative process, rather than simply timely to accord potential defendants notice

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[13] See Footnotes 7 and 9, supra.

and a brief opportunity for informal resolution prior to instituting suit.

On March 9, 1972 (the day after Congress finally passed the Title VII amendments that included the new § 717), Senator Bentsen, the leading congressional proponent of prohibiting age discrimination in federal employment, introduced a bill that would have done so simply by amending the definition of "employer" under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 630(b), to include the federal government, S.3318, 92nd Cong., 2d Sess., 118 Cong. Rec. 7745 (1972), *Lehman v. Nakshian*, 453 U.S. at 166 n.14. No action was taken on this measure, however, and on May 4, 1972, Senator Bentsen introduced a revised version of this bill in the form of an amendment to Senate Bill S.1861, a set of proposed amendments to the Fair Labor Standards Act then pending in the Senate.[14] Stating that he had revised his bill in order to give federal ADEA claimants the benefits of the recent Title VII amendments, Senator Bentsen proposed a statute identical to the newly enacted § 717 of Title VII, except that it prohibited only age discrimination and eliminated provisions relating to affirmative action efforts, S.1861, Amend. No. 1177, 92nd Cong., 2d Sess., 118 Cong. Rec. 15894-96, (1972) (remarks of Senator Bentsen and text of proposed amendment). This proposed language, which excluded the notice option of the private ADEA, was not adopted either.

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[14] Although this bill was passed by the Senate in 1972, it was not until 1974 that the final version was passed by both Houses of Congress and signed by the President.

Instead, when S.1861 and its proposed amendments were reported out of committee, the language of the proposed statute had been crucially altered, S. Rep. No. 842, 92nd Cong., 2d Sess., 93-94 (1972); 118 Cong. Rec. 24396 (1972). Rather than directly tracking either the private sector ADEA or the federal sector Title VII provisions, the new version of the proposed statute was a hybrid of the two statutes it derived from,[15] according federal age discrimination claimants the benefit of the remedial schemes of both statutes.

Subsections (a) and (b) of the proposed statute were unchanged and continued to track the Title VII language, S. Rep. No. 842 at 93-94[16]. Subsection (c) of Senator Bentsen's proposed statute, which had previously been identical to § 717(c) of Title VII was, however, replaced with a new subsection (c) which contained the language

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[15] The fact that the prohibition of age discrimination in federal employment had its origins in, and remained connected to, the Fair Labor Standards Act is reflected not only by the fact that the provision was consistently considered and enacted as an FLSA amendment and not as an independent statute or a Title VII amendment, but also by express congressional statements that the statute is "a logical extension of the committee's decision to extend FLSA coverage to federal, state and local government employees." S. Rep. 842, 92nd Cong., 2d Sess 45 (1972); H.R. Rep. 913, 93rd Cong., 2d Sess. 40 (1974), *reprinted in* 1974 U.S. Code Cong. & Admin. News 2811, 2849.

[16] In this respect, the measures used to protect federal employees under the ADEA are, indeed, "substantially similar" to those under Title VII, *Nakshian*, 453 U.S. at 167 n.15, 118 Cong. Rec. 24397 (1972), since they give ADEA claimants optional access to the administrative adjudication process established for Title VII claimants.

that ultimately was enacted into law as § 15(c) of the Age Discrimination and Employment Act, 29 U.S.C. § 633a(c), S. Rep. No. 842 at 94. This language specifically eliminated the requirement of § 717(c) that a federal civil action was permitted only after a final agency decision or default and replaced it with a general grant of district court jurisdiction, § 15(c), 29 U.S.C. § 633(c). In addition, a new subsection (d) was added, giving aggrieved federal employees the option of using a notice procedure, identical (in all but the length of notice required) to the notice procedure then established for private sector ADEA claimants. Compare the language of the ADEA as it was then in effect, § 7(d) and (d)(1) 81 Stat. 605:

> (d) No civil action may be commenced by any individual under this Section until the individual has given . . . not less than sixty days notice of an intent to file such action. Such notice shall be filed –
>
> (1) within one hundred eighty days after the alleged unlawful practice occurred. . . .

with § 15(d) as enacted in 1974, 29 U.S.C. § 633a(d):

> (d) . . . no civil action may be commenced by any individual under this section until the individual has given not . . . less than thirty days notice of an intent to file such action. Such notice shall be filed within one hundred eighty days after the alleged unlawful practice occurred. . . . "[17]

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[17] The 1978 change in § 7, 29 U.S.C. § 626, from a "notice" to a "charge" requirement was not made to § 15. However, that change was apparently made primarily to dispense with the

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The only further change to § 15 occurred in 1973, when Congress added the language (not found in § 717(b) of the Civil Rights Act) that became § 15(b)(3) mandating that the Commission "provide for the acceptance and processing of complaints of discrimination in federal employment on account of age," 29 U.S.C. § 633a(b)(3), S. Rep. 300, 93rd Cong., 1st Sess. 107 (1973). There is no direct comment concerning this change, see S. Rep. 300 at 56, but it clearly reinforces the view that § 15 gave federal ADEA claimants the maximum number of options. Section 15(b)(3) forestalls the possibility that the Commission would interpret the non-mandatory nature of § 15(b) procedures to allow dispensing with such a complaint procedure altogether. Nonetheless, § 15(d) was retained, so that avenue of relief remained available as well.

This legislative history compels the conclusion that, as the law plainly provides, federal courts would be allowed to consider the merits of federal employee ADEA claims under § 15(c) whether or not the federal employee had first presented his claim for adjudication in the administrative process under § 15(b). Rather, an aggrieved federal employee could avoid § 15(b) process

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possibility that § 7 notices could be deemed inadequate because they did not expressly state that a suit was contemplated, see n. 12, supra. Since Petitioner's notice [J.A. 15] does expressly state such an intent, the distinction is not relevant for purposes of the instant case *c.f., Lehman v. Nakshian*, 415 U.S. 516, (failure to amend § 15 to permit jury trial at same time as private sector remedies were so amended *does* foreclose the possibility of jury trial under § 15).

by giving the same notice as an aggrieved private sector employee, waiting thirty days, and going to court under § 15(c) and (d) at any time thereafter. The statute and Congress do not express a preference for the § 15(b) process over the § 15(d) process, or vice versa. The statute simply gives employees the two options as co-equal avenues of relief.

This legislative history also amply reinforces reading the first clause of § 15(d) to permit a person whose § 15(b) complaint is rejected as untimely to take the § 15(d) route to federal court. It is clear that, in contrast to federal Title VII claimants, federal ADEA claimants were vested by Congress with the right to go to court notwithstanding any failure to comply with the regulatory requirements promulgated under § 15(b), including the regulatory requirement ultimately propounded as § 29 C.F.R. § 1613.214(a)(1)(i) that an EEO counselor must be contacted within thirty days of the discrimination in order to preserve the right to an administrative appeal. After all, a person who opts to go under § 15(d) by filing a notice of intent without trying to invoke the administrative procedures at all has by definition failed to comply with the counselor contact requisite of § 1613.214. Clearly this individual is entitled to use the § 15(d) method to go to court so long as he gives notice of intent within 180 days. It seems inconceivable that Congress intended the language of § 15(d) to be read as distinguishing an ADEA claimant whose § 15(b) default consists of never contacting an EEO counselor, and Petitioner here, whose § 15(b) default consists of contacting the EEO counselor too late and without good cause, but who timely filed a § 15(d) notice. These individuals are situated identically with

respect to § 15(b): both are equally foreclosed from getting their § 15(b) administrative complaints accepted or processed by the agency, § 1613.214(a)(1)(i). There is no basis for thinking that Congress intended that the statute would treat these two individuals as differently situated with respect to § 15(d). Neither of them had an administrative complaint accepted for filing and processing and both gave notice within 180 days of their notice of intent to sue.

Moreover, to read such a restrictive distinction into § 15 – especially where it would prevent access to the statutorily created § 15(c) and (d) process because of defaults that had nothing to do with § 15(c) and (d) process itself – would be inconsistent with Congress' general mandate regarding anti-discrimination legislation in federal employment:

> [T]here can exist no justification for anything but a vigorous effort to accord Federal employees the same rights and impartial treatment which the law seeks to afford employees in the private sector, H.R. Rep. No. 238, 92nd Cong. 2d Sess. (1972) *reprinted in* 1972 U.S. Code Cong. & Admin. News 2137, 2158.

This statement, made in the context of the debate and adoption of the Title VII Amendments in 1972, was incorporated and adopted as the guiding principle for ADEA protection in the federal sector as well, e.g., remarks of Senator Bentsen, 118 Cong. Rec. 15894-96 (1972). This is borne out by the fact that § 15 of the ADEA explicitly gave federal ADEA claimants an avenue to federal court nearly identical to that of their private sector counterparts. This avenue had been adopted deliberately, in order to facilitate rapid access to federal court by people

"to whom, by definition, relatively few productive years are left", 113 Cong. Rec. 7076 (1967) (remarks of Sen. Javits).

The statutory language and legislative history thus offer little support to the decisions requiring exhaustion in *Purtill*, *Castro*, *White*, *McGinty*, or *Limongilli*, much less the draconian election requirement imposed on the Petitioner here. Indeed, in the passage on which all the cases following *Purtill* rely, the *Purtill* court admitted that it was going beyond the express statutory language, but that it arrived at its conclusion that exhaustion would be required because it saw no indication of a congressional intent "contrary" to requiring exhaustion, 658 F.2d at 138. The express consideration and rejection by Congress of wording the ADEA identically to the passages of Title VII imposing an exhaustion requirement, and Congress' equally express decision to give federal sector age discrimination claimants a notice process identical to that of their private sector counterparts in addition to any administrative remedies, seems ample evidence of the "contrary congressional intent" that *Purtill* and its progeny could not find, *Purtill*, id. This legislative history was to a great extent found and relied on by the courts deciding *Langford*, *McIntosh*, *Ray* and *Kennedy* to support their interpreting the statute's plain language to not require exhaustion of administrative statute remedies. It is clear that this position is the one which is more strongly supported by the statutory language and legislative history and which should be adopted by this Court.

C. This Court's Guiding Principles In Interpreting Federal Anti-Discrimination Statutes Also Support Not Imposing A Stringent Election Or Exhaustion Requirement On Federal ADEA Claimants.

This Court has not previously addressed the interface between the two different remedial options accorded federal employee ADEA claimants under §§ 15(b) and 15(d) of the ADEA or the differing procedural routes – via agency administrative adjudication under § 15(b) or via notice of intent without adjudication under § 15(d) – these differing options prescribe for the filing of a civil action in federal district court pursuant to § 15(c) of the Act. It has, however, addressed related matters.

As a general principle, this Court has recognized and endorsed the broad remedial purposes of federal anti-discrimination legislation and has declined to impose unduly complicated or preclusive procedural barriers to obtaining federal court review on anti-discrimination claimants, many of whom are, at least at the initial stages, unrepresented by counsel, *Love v. Pullman Co.*, 404 U.S. 522, 527 (1972), *Zipes v. Trans World Airlines*, 455 U.S. 385, 71 L.Ed.2d 234, 102 S.Ct. 1127 (1982).[18] This Court has

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[18] This Court has now held that the equitable modification principles of *Zipes* are applicable to suits against the federal government under § 717(c) of Title VII, *Irwin v. Veterans Administration*, ___ U.S. ___, 59 U.S.L.W. 4021, 4023 (Dec. 3, 1990). Courts which have addressed *Zipes'* applicability to § 15 of the ADEA have either found it applicable to administrative deadlines thereunder, e.g., *Ray*, 704 F.2d at 1483, *Castro*, 775 F.2d at

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also been reluctant to hold discrimination victims to strict election-of-remedies requirements that deprive them of access to federal court for *de novo* consideration of their discrimination claims, *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974), *Chandler v. Roudebush*, 425 U.S. 840 (1976). These considerations are particularly apropos in the instant case, where Petitioner without counsel [Pet. App., A-1, n.1], attempted to negotiate a multi-option bureaucratic labyrinth by doing something to preserve each of his possible avenues of relief. The court of appeals' decision in essence punishes him for this assiduous attempt to "cover all the bases."

Where a statute does not specifically prescribe an administrative process that needs to be exhausted, this Court does not hesitate to allow persons seeking judicial relief under federal statutes to forego exhaustion of voluntary administrative procedures where those procedures would be futile or inadequate to resolving the merits of their claims, *Coit Independence Joint Venture v.*

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403 n.4 or assumed that it was, e.g., *McGinty*, 900 F.2d at 1118. This issue need not be decided in the instant case since Petitioner timely complied with all his § 15(d) deadlines and has abandoned any claims that his default under § 15(b) should be excused. The only divergence from the "letter of the law" in this case came when he filed his notice of intent with his own agency, rather than with the EEOC. However, the EEOC has, pursuant to its grant of regulation-making power under § 15(b)(3), designated the employing agencies as its agents for receipt of § 15(d) notices, *Purtill* at 138, Brief in Opposition at 6 n.4 and Petitioner has thus complied with the language of the statute, and does not require equitable relief from any filing obligation for his § 15(d) notice to be valid.

FSLIC, 489 U.S. 561 (1989), *Honig v. Doe*, 484 U.S. 305, 326-27 (1988); or where the underlying policy of the statute would be served without exhaustion, *Bowen v. City of N.Y.*, 476 U.S. 467, 485 (1986).

On a more specific level, this Court has had one occasion to construe the language of § 15 of the ADEA. In *Lehman v. Nakshian*, 453 U.S. 156, 158, this Court was called upon to decide whether or not § 15(c) allowed federal sector ADEA claimants the same right to a jury trial as is accorded their private sector counterparts by § 7(c) of the Act, 29 U.S.C. § 626(c) and this Court in *Lorillard v. Pons*, 434 U.S. 575 (1978). In *Nakshian*, this Court concluded that federal sector ADEA claimants did not have such a right because Congress did not specifically grant it to them under § 15(c) of the Act as it had under § 7(c), 453 U.S. at 167, and that the statute could therefore not be interpreted to override the longstanding principle of American jurisprudence that "the Seventh Amendment right to trial by jury in suits at common law does not extend to civil actions against the Federal Government", 453 U.S. at 175 (citations omitted). As this decision did not specifically address what the statute requires of ADEA claimants prior to reaching federal court, it is of limited usefulness in resolving the substantive problem presented here. Its attention to legislative history, however, provides precedent for a similarly scrupulous inquiry in the instant case, 453 U.S. at 166-68.

Some procedural aspects of the Title VII antecedent to § 15(b) were addressed by this Court in *Brown v. GSA*, 425 U.S. 820, and *Chandler v. Roudebush*, 425 U.S. 840 (1976). *Brown* found that § 717 was the exclusive remedy for federal employees claiming discrimination covered by

Title VII and held that compliance with the "rigorous administrative exhaustion requirements and time limitations" was required in order that the "crucial" role allotted by Congress to the administrative process under Title VII could be fulfilled, 425 U.S. at 833. Once again, it was very scrupulous review of the specific legislative history of the section that led the court to its conclusion, 425 U.S. at 827-29. Similar careful review of the legislative history of the ADEA makes it clear that the administrative option under § 15(b) is not mandatory and does not play the same sort of crucial role in ADEA enforcement as it does under Title VII, see *Kennedy v. Whitehurst*, 690 F.2d at 964.

Chandler v. Roudebush, 425 U.S. 840 also makes a careful study of the specific legislative history appropriate to Title VII, 425 U.S. at 848-61 and concludes that even though the administrative remedies play a crucial role and must be timely invoked and exhausted as set forth in *Brown*, aggrieved federal sector discrimination claimants are nonetheless entitled to the same *de novo* consideration of their claims by a federal court as private sector employees, 425 U.S. at 863. Petitioner submits that under the ADEA, where administrative remedies are neither mandatory nor crucial, *Chandler* requires that access to federal court be read as expansively as the statutory language permits.

Finally, this Court has had the opportunity to interpret a procedural aspect of § 15's other antecedent, the private sector provisions of the ADEA 29 U.S.C. §§ 626, 633. In *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979), this Court construed the meaning of the notice requirement contained in § 14(b) of the ADEA, 29 U.S.C. § 633(b), a notice requirement that it is not dissimilar to

the notice requirement of § 15(d). Section 14(b) requires that private sector ADEA claimants commence proceedings with state agencies in states that have such agencies and wait sixty days thereafter before filing suit in federal court. There is no requirement that the claimant await a final action by the state agency. In *Oscar Mayer*, this Court construed § 14(b) to be, essentially, a notice requirement, and concluded that because § 14(b) "does not stipulate an exhaustion requirement" all the statute was meant to do was "to give. . . . a limited opportunity to settle the grievances of ADEA claimants in a voluntary and localized manner", 441 U.S. 761. *Oscar Mayer* is therefore helpful in reiterating the underlying principle that ADEA claimants are accorded multiple options for an administrative resolution of their claims but are not held to an exhaustion requirement with respect to any of them. It also reinforces the view that when Congress requires only a notice under the ADEA, that is *all* that is required, and that nothing further should be read into the statute in that regard by the courts.

In light of the statutory language, legislative history and this Court's relevant precedent, Petitioner respectfully submits that § 15 of the ADEA is unambiguous in rejecting a requirement that federal employees with age discrimination claims must exhaust or be preclusively bound to an election of their § 15(b) administrative remedies. However, to the extent that there may be an ambiguity in the statutory language, the regulatory activity of the Equal Employment Opportunity Commission can be helpful and instructive. The fact that the EEOC did not, in the regulations it promulgated to implement § 15, contemplate requiring preclusive election of,

or exhaustion once they were invoked of, administrative. remedies, §§ 1613.511, 513, 514, 521, weighs under this Court's established precedent heavily in favor of a non-preclusive, no-exhaustion reading of the statute.

This Court has long held that an agency's regulatory interpretation of the statute it is charged with enforcing even if not binding is ordinarily entitled to "considerable respect" as a guide to statutory construction, *Ford Motor Credit Co. v. Cenance*, 452 U.S. 155, 158 n.3 (1981), see also *Firefighters v. Cleveland*, 478 U.S. 501, 518 (1986). Indeed, if the regulations are promulgated under a specific grant of legislative authority, they must be deferred to so long as the interpretation is "not inconsistent with the statutory mandate [and does not] frustrate the policy that Congress sought to implement", *FEC v. Democratic Campaign Comm.*, 454 U.S. 27, 32 (1981), is "a permissible construction" of the statute, "rational and consistent with the statute", *Sullivan v. Everhart*, ___ U.S. ___, 110 S.Ct. 960 (1990) and represents a contemporaneous and consistent interpretation of the Act by the enforcing agency, *EEOC v. Assoc. Dry Goods Corp.*, 449 U.S. 590, 600 n.17, 66 L.Ed. 2d 762, 101 S.Ct. 817 (1981). Only if the regulatory interpretation is "at odds with the plain language of the statute itself" will the agency's interpretation be rejected, *Public Employees v. Betts*, 492 U.S. ___, ___, 106 L.Ed. 2d 134, 151, 109 S.Ct. 2854 (1989), see also *Atkins v. Rivera*, 477 U.S. 154, 162 (1986), *Chevron v. NRDC*, 467 U.S. 837, 844 (1984).

Section 15 is extremely "plain" in not conditioning the right to seek federal court relief in federal employee ADEA cases on obtaining a final agency action on an administrative complaint and in establishing a simple

notice procedure for getting to federal court without such final agency action. To the extent that the statute is not "plain", it is only with respect to whether or not the introductory clause to § 15(d) ("When the individual has not filed a complaint concerning age discrimination with the Commission. . . . ") should be read as exclusive of other relief, *White v. Frank*, 718 F.Supp. at 596 (§ 15(d) *available only if* no § 15(b) complaint is filed) or as supplement to other types of relief, *Ray*, 704 F.2d at 1484 (§ 15(d) notice is *necessary only if* there has not been a § 15(b) complaint filed). Given that the statute goes on within the same section to expressly state that the only purpose of the § 15(d) notice is to make the alleged discriminator aware of its actions and to give it a chance to rectify the problem without a long administrative or judicial inquiry, it would seem that the *Ray* interpretation should be accepted even without reference to how the agency has handled this issue.

However, if this language is still deemed ambiguous, reference to the EEOC's interpretation of the meaning of this clause verifies that the non-exclusive interpretation of § 15 (b) is the correct one. It is clear that the EEOC supports a non-preclusive reading of § 15(d). Not only does it specifically craft its age discrimination regulations to dispense with all reference to final agency action or other exhaustion, it actually accepts agency § 15(b) complaint filings as § 15(d) notices, Brief in Opposition, p.6, n.4, *Purtill* at 138. This interpretation is clearly not "at odds with the statute" *c.f., Betts*, 492 U.S. at ___, 106 L.Ed. 2d at 151-152. Rather, it is a rational and consistent interpretation of the Act, which is also fully consistent with the express statutory mandate, even if it is not the only

grammatically possible interpretation, *FEC v. Democratic Campaign Comm.*, 454 U.S. at 36-37.

To adopt an interpretation of § 15(d) so preclusive as to keep an employee who properly follows its procedural requirements out of court, simply because he also knocked at the door of administrative relief but was turned away, is inconsistent with both the Act and with judicial economy. While such an interpretation would save the federal courts from having to adjudicate this Petitioner's claim any further, the long term result would be to increase the number of federal employee ADEA claims that reach the federal courts unmediated by the administrative process. The ADEA clearly does not make invoking the administrative process mandatory. It must therefore be made as attractive as possible if employees are to take advantage of it. If ADEA claimants know that a failed effort to get their employer to adjudicate their claim will completely foreclose them from federal court action, it is unlikely that they will risk such a failure. Thus, considerations of judicial economy also dictate a non-preclusive reading of § 15(d), at least where, as here, the § 15(b) remedies do not afford an administrative adjudication of the claim on its merits.

CONCLUSION

The correction by this Court of the Fifth Circuit's misreading of the length of notice required under § 15(d), and resolution of the issues of election and exhaustion of remedies under § 15 of the ADEA will affect thousands of federal employees over the age of forty as well as the

hundreds of federal government agencies which employ them. Employer and employee alike are in need of, and entitled to, the guidance of this Court in defining what is and is not required to pursue a claim of age discrimination in federal court. The individual Petitioner before this Court should not, however, be lost from view. Charles Z. Stevens believes he was discriminated against by his employer and has done everything within his power to obtain an adjudication of the merits of that claim.

F. this Court to allow a clear misreading of a notice provision to keep Mr. Stevens from that adjudication, or to condone judicially reading into the ADEA the draconian exhaustion and election of remedies not warranted by the statute's plain language, would not just be prescribing a procedural hurdle for all federal age discrimination claimants that is not in the language of the statute. It would also be depriving this individual Petitioner, Charles Z. Stevens, the opportunity to be heard on the merits of his age discrimination claim, a right that Congress believed it was according him and other federal employees in 1974 when it extended the Age Discrimination in Employment Act to cover them, and which he has sought since 1987.

As set forth in the foregoing discussion, this Court has recognized that it is bound to interpret statutes so they are to the greatest extent possible consistent with their plain language and with what Congress intended them to be. Under these principles, this Court should not hesitate to hold that § 15 of the Age Discrimination in Employment Act by its plain language accords federal employees, like the Petitioner here, multiple non-preclusive routes to federal court review of their claims.

Petitioner respectfully submits therefore that the decision of the court of appeals affirming dismissal of his case should be reversed and this matter remanded for consideration on the merits of his age discrimination in employment claim.

Respectfully submitted,

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